No. 15581

United States Court of Appeals

FOR THE NINTH CIRCUIT

AVALO ALLISON FISHER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

PHILIP R. MONAHAN,
BRUCE J. TERRIS,
Attorneys, Department of Justice,
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 12/26/57 — 45 COPIES

No. 15581

United States Court of Appeals

FOR THE NINTH CIRCUIT

AVALO ALLISON FISHER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

PHILIP R. MONAHAN,
BRUCE J. TERRIS,
Attorneys, Department of Justice,
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 12/26/57 — 45 COPIES

INDEX

Page

JURISDICTION 1

QUESTIONS PRESENTED 2

COUNTERSTATEMENT OF THE CASE 3

The evidence of the falsity of appellant's affidavits 4

(a) Evidence antedating the first affidavit (filed June 29, 1951) 5

(b) Evidence relating to the period between the filing of the first affidavit (June 29, 1951) and the filing of the second affidavit (July 11, 1952) 16

(c) Evidence relating to the period after the filing of the second affidavit (July 11, 1952) 17

Appellant's Defense 22

ARGUMENT

I. The two-witness perjury rule does not apply to prosecutions under 18 U.S.C. 1001 22

II. Appellant could not have been prejudiced by the alleged duplicity and multiplicity of the indictment, since he was given concurrent sentences on the several counts 26

III. The innocent error of government counsel in cross-examining appellant's character witness Hitchcock does not warrant the granting of a new trial. 28

CONCLUSION 44

CITATIONS

Page

CASES:

Bryson v. *United States,* 238 F. 2d 657, certiorari denied, 78 S.Ct. 20 24

Clark v. *United States,* 23 F. 2d 756 ..... 39, 40

Cossack v. *United States,* 84 F. 2d 214, certiorari denied, 298 U.S. 654, 678 43

Dennis v. *United States,* 341 U.S. 494 13

Fisher v. *United States,* 231 F. 2d 99 ..... 4, 23, 24, 27

Gerard v. *United States,* 61 F. 2d 872 31

Gold v. *United States,* 237 F. 2d 764, reversed on other grounds, 352 U.S. 985 23

Hupman v. *United States,* 219 F. 2d 243, certiorari denied, 349 U.S. 953 23

Jenkins v. *United States,* 149 F. 2d 118, certiorari denied, 326 U.S. 721 31

Jung Quey v. *United States,* 222 Fed. 766 39

Kasper v. *United States,* 225 F. 2d 275 ..... 42, 43

Lewis v. *United States,* 74 F. 2d 173 40

Little v. *United States,* 93 F. 2d 401, certiorari denied, 303 U.S. 644 42

Marron v. *United States,* 18 F. 2d 218, affirmed, 275 U.S. 192 ..... 23, 27, 39

Metzler v. *United States,* 64 F. 2d 203 39

Michelson v. *United States,* 335 U.S. 469 41

Mitrovich v. *United States,* 15 F. 2d 163 41

Nye & Nissen v. *United States,* 168 F. 2d 846, affirmed, 336 U.S. 613 39

Opper v. *United States,* 348 U.S. 84 38

Remus v. *United States,* 291 Fed. 501, certiorari denied, 263 U.S. 717 39

CASES *(Continued)*

Page

Roberts v. *United States,* 96 F. 2d 39 43

Sawyer v. *United States,* 202 U.S. 150 39

Sloan v. *United States,* 31 F. 2d 902 41

United States v. *Killian,* 246 F. 2d 77, rehearing granted and cause remanded on other grounds, 246 F. 2d 82 23

United States v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 39

Weiler v. *United States,* 323 U.S. 606 26

STATUTES:

National Labor Relations Act, §9(h), as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)) 3

18 U.S.C. 1001 ..... 2, 3, 22, 23, 24, 25

MISCELLANEOUS:

47 A.L.R. 2d 1302 41

No. 15581

United States Court of Appeals

FOR THE NINTH CIRCUIT

AVALO ALLISON FISHER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

JURISDICTION

Appellee accepts appellant's jurisdictional statement (Br. 1-2).*

* While appellee does not move to dismiss the appeal for failure of appellant to file his brief within the time allowed by the Rules of this Court, we direct the Court's attention to the fact (for such action, if any, as the Court, on its own motion, may desire to take) that appellant's brief was in fact, apparently, not timely filed.

Our files reflect that counsel for appellant, on October 29, 1957, mailed to this Court for filing a

QUESTIONS PRESENTED

1. Whether the two-witness perjury rule applies to a prosecution under 18 U.S.C. 1001 for filing a false non-Communist affidavit with the National Labor Relations Board.

2. Whether appellant could have been prejudiced by the alleged duplicity and multiplicity of the indictment, in view of the fact that he was given concurrent sentences on the several counts.

3. Whether the innocent error of government counsel in framing one of the questions asked on cross-examination of one of appellant's character witnesses warrants, under all the circumstances (including the fact that the question and answer were stricken and the jury instructed to disregard the matter entirely), the granting of a new trial.

"Motion to Fix Time for Filing and to Extend Said Time," in which he moved the Court to "set the time for the filing of the brief of appellant in this case on November 15, 1957, and if necessary to extend said time now allowed." In an accompanying affidavit, counsel attested that he had not received the transcript of record in this case until on or about October 5, 1957, and stated that he believed he would be able to file his brief "on or about November 15, 1957." We have been advised by the Clerk that, as of November 21, 1957, the foregoing motion had not been acted on by the Court and appellant's brief had not been filed. The brief was finally filed on or about December 4, 1957. See Rule 18(1) and (7) of the Rules of this Court.

COUNTERSTATEMENT OF THE CASE

Count I of a six-count indictment (Tr. 781-782)[1], returned in the United States District Court for the Western District of Washington, charged appellant with having falsely attested, in an affidavit filed with the National Labor Relations Board on June 29, 1951, that he was not as of the date of the affidavit a member of the Communist Party, in violation of 18 U.S.C. 1001 and Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)). Count II charged that he falsely attested in the same affidavit that he was not affiliated with the Party. Counts III and IV charged that he falsely denied membership and affiliation, respectively, in the Party in a second affidavit, filed July 11, 1952. The remaining counts — V and VI — are no longer involved herein.[2]

Following a trial by jury, appellant was found guilty on each of these four counts, but on appeal to this Court, the judgment of conviction was set aside

---

[1] "Tr." will be used herein to refer to the official transcript of the court reporter. "Ex." will refer to Government exhibits.

[2] Counts V and VI charged false denial of membership and affiliation, respectively, in a third affidavit, filed June 3, 1953. Appellant was acquitted on both these counts at his former trial.

and a new trial ordered because of trial errors relating to exclusion of evidence and the instructions to the jury. *Fisher* v. *United States*, 231 F. 2d 99. Appellant was thereafter retried and, on March 21 1957, was again convicted on all four counts (Tr. 812-815). He was sentenced to five years imprisonment on each count, to run concurrently. The present appeal is from this second conviction.

The evidence adduced by the Government at appellant's second trial may be summarized as follows:

It was established at the trial, and is not disputed, that appellant, as an officer of Local 2-93 (now 23-93) of the International Woodworkers of America, located in Sultan, Washington (Exs. 3 and 4; Tr. 87-99, 107-108, 100-101), executed and caused to be filed with the National Labor Relations Board the two affidavits on which the four counts here involved are founded (Exs. 1 and 2; Tr. 96, 125-126, 132-133).

The Evidence of the Falsity of Appellant's Affidavits

The Government adduced a wealth of evidence tending to indicate that appellant, from a time antedating the filing of the first of his two affidavits here involved (June 29, 1951) to and beyond the date of the filing of his second affidavit (July 11, 1952), was at all times a member of the Community Party. That evidence is summarized hereinbelow:

(*a*) *Evidence antedating the first affidavit (filed June 29, 1951).* — In April 1944, appellant attended a convention of District 2 of the International Woodworkers of America, Northern Washington Council (Tr. 193). At this convention he approached a fellow member of the International Woodworkers, Walter H. Swinhart, with a "proposition" which he requested Swinhart to keep confidential (Tr. 210). After being assured by Swinhart that he would do so, appellant discussed with Swinhart the nature and aims of the Communist Party (Tr. 210). Appellant argued that "the object of the Communist Party wasn't so much to communize a nation as to force a modification of our present capitalistic system" (Tr. 210). During the ensuing conversation, which lasted approximately an hour, appellant urged Swinhart to join the Communist Party (Tr. 210). After Swinhart agreed to do so (Tr. 210), appellant suggested that Swinhart pay ten dollars either as an initiation fee or as dues or as a combination of both (Tr. 211). Swinhart gave appellant the amount suggested and in return received a Communist Party membership card by mail (Tr. 211). In July or August of 1944, Swinhart saw appellant in a logging camp near Mineral, Washington (Tr. 212). They had several conversations during which there was "some discussion about the Communist Party," including the

question of whether Swinhart was paid up in his Party dues (Tr. 213-214).

In February 1945, appellant attended a meeting of the Communist Political Association[3] in the Clark Building in Everett, Washington (Tr. 252, 254).[4] This was a meeting of some ten or eleven persons, mostly woodworkers, who were addressed by one Karly Larsen, a member of the Communist Political Association and later a member of the District Executive Board of the Northwest District of the Communist Party[5] (Tr. 254, 464). Later in the same year, appellant attended another Party meeting of the Everett

---

[3] The Communist Party was called the Communist Political Association for a period of approximately a year in the period 1944-1945 (Tr. 253-254).

[4] Party meetings were open to Party members only, except for occasional open branch meetings to which prospective recruits were invited (Tr. 519-520). To be admitted to a Party meeting a person had to be known to the Party leadership present at the meeting (Tr. 520-522, 552-555). Even a Party membership card was not sufficient to gain admittance if the bearer was not also known as a Party member to those in attendance (Tr. 524-525).

[5] The District Executive Board, the executive body of the District Committee, was the body "responsible for the Party in every way between District Committee meetings" (Tr. 462-463). The District Committee was elected at District Conventions as the "leading and responsible body of the party at all times in between conventions" (Tr. 461).

Club, held in the same building (Tr. 583-584). Margaret Nygren, a Party member who was at one time in charge of the Everett region (Tr. 257), introduced appellant to Mazie Mores, a former Party member who had rejoined at the request of Federal Bureau of Investigation (Tr. 572-575), as "Comrade Fisher" (Tr. 583-584).

In late 1945 appellant became a member of the Party's Northwest District Committee (Tr. 471, 550), the governing group for the District, which was made up entirely of Party members (Tr. 462). He was chosen for this position because, "besides general qualifications of being a Communist Party member who had carried out his responsibilities well, * * * he held an important labor position, which would give him an opportunity to influence many workers and other people * * *" (Tr. 471-472). After his election he attended Committee meetings regularly from late 1945 until early 1947, and he continued to attend such meetings, though less frequently, during the rest of 1947 (Tr. 472). He served as a member of the District Committee for about two years, until early 1948, at which time the Party drastically reduced the Committee's membership (Tr. 473). This reduction was the result of the Party's belief that persons in "mass positions", such as in labor or political work, "should not be exposed to being known to too many

people as Communists", and, further, that the "Committee should not be too large in the event of prosecution" (Tr. 473).[6]

In March 1946, appellant attended an emergency meeting of the Northwest District Committee, which was held for the purpose of organizing a "Win the Peace" conference (Tr. 475-476). The purpose of the conference was to protest a speech made by Winston Churchill proposing an Anglo-American military alliance against the Soviet Union (Tr. 475-476). All the persons attending the Committee meeting were Party members (Tr. 475). The meeting was addressed by Henry Huff, who made the main report, Andrew Remes[7], who spoke on the "Win the Peace" campaign, and appellant, who spoke on sponsorship of "Win the Peace" conferences (Tr. 476). Since "major sponsorship" was needed, appellant stated that he would be willing to sponsor such a conference and that he would attempt to persuade other labor officials to be spon-

---

[6] At this same time, as part of its program of clandestine operation, the Party decided to collect and destroy outstanding membership cards nationally and to reduce the size of all branches and sections in order to keep the identity of its members secret (Tr. 474-475).

[7] In the transcript, "Remes" is incorrectly spelled "Reems."

sors (Tr. 476). The conference was in fact held about a week later (Tr. 476-477).

In June 1946, appellant attended a two-county Communist Party meeting in Vassa Hall, Everett, Washington (Tr. 256-257). All of the thirty-five persons present were Party members, the meeting not being open to others (Tr. 256, 346-348). To ensure that no non-Communists were admitted, participants were checked at the door. (Tr. 347-348). The meeting was addressed by Party members Laurange Krattler, Margaret Nygren, and Frank Patterson (Tr. 256-257, 597-598).

In February 1948, appellant spoke to an enlarged District Executive Board meeting[8] at the home of William K. Dobbins (Tr. 477, 551), a member of the Executive Board (Tr. 464, 477). Those in attendance were checked in the customary manner to ensure that all were Party members (Tr. 479, 552-555). Two matters were discussed at the meeting — the deportation proceedings which had been brought against Ferdinand Smith, an official of the National Maritime

---

[8] An enlarged District Executive Board meeting is a meeting of the Executive Board to which one or more other Party members, leaders in a particular field, are invited (Tr. 477, 551). Appellant was not then a member of the District Committee or District Executive Board (Tr. 478).

Union, and the investigation of the Washington Pension Union by the Canwell Committee[9] (Tr. 478). The meeting was addressed by Henry Huff (Tr. 478), the Chairman of the Party's Northwest District and a member of the District Executive Board (Tr. 263, 464), and by appellant (Tr. 479). Huff stressed the seriousness of the investigation by the Canwell Committee and outlined a program to combat it (Tr. 478). He also urged the necessity of the Party's protesting against other deportation proceedings against Party officials which were being held contemporaneously with the proceedings against Smith (Tr. 478-479). In his speech, appellant castigated the investigation of the Pension Union by the Canwell Committee as "really an attack on the whole labor movement" and as an attempt "to drum up an hysterical atmosphere in which it would be possible to start another prosecution of Harry Bridges, the longshore leader" (Tr. 479).

In the spring of 1948, appellant was present at an enlarged Executive Board meeting which discussed the policy of concentrating Party activity of the District in the lumber, aircraft, and marine industries (Tr. 482-483). After the discussion, Barbara Hartle, the organizer of the South King County Region and a member of the District Committee and Ex-

---

[9] A committee of the Washington State Legislature.

ecutive Board (Tr. 461, 464-465), mentioned that she was having trouble finding transportation to Enumclaw, Washington, where she was to attend a Party branch meeting (Tr. 483-484). Appellant told Mrs. Hartle that he had Party business of his own in that area and promised to drive her there (Tr. 483-484). Accordingly, a few days later, appellant drove Mrs. Hartle to Enumclaw (Tr. 484). On the way Mrs. Hartle told appellant that she was going to the house of Bob Blakely, a Party member; appellant, without further direction, drove her to Blakely's house (Tr. 484-485). At Blakely's house appellant greeted Blakely and then left (Tr. 485). Several hours later appellant returned and, after talking to some Party members, drove Mrs. Hartle back to Seattle (Tr. 485).

In May 1948, appellant participated in a meeting of the International Woodworkers of America "fraction"[10] in Seattle (Tr. 479-480, 550-552). Those attending the meeting were checked to make sure that only Party members were present (Tr. 552-555). The purpose of the meeting was to receive directions from the Party's District leadership with respect to raising $30,000, which had been set as the amount to be col-

---

[10] A "fraction" is the "membership of the Communist Party in another organization", such as the Party members who belong to a particular labor union (Tr. 480).

lected in an extensive campaign which was being waged against passage of the Mundt-Nixon bill (Tr. 480-481). Appellant made a speech in which he stated that he would be going to Washington, D. C., in his capacity as a labor leader, to fight the bill (Tr. 481). Several weeks later appellant did go to Washington for this purpose (Tr. 481).

On January 1, 1949, appellant attended an enlarged District Committee meeting in the Frye Hotel in Seattle (Tr. 257-258, 485-487). Appellant and Stan Hendrickson, another Party member who was at one time the Party organizer in Everett (Tr. 598), were driven to the meeting by Harley Mores, who, like his wife, Mazie Mores, was a former member of the Party who had rejoined at the request of the Federal Bureau of Investigation (Tr. 235-237, 258). Mores drove first to the Frontier Bookstore, the Party bookstore which "had been directed to us in the region and the clubs * * * [as] the place to pick up our literature" (Tr. 258-259). Appellant, Mores, and Hendrickson went into the bookstore, where Hendrickson, in the presence of Mores and appellant, asked the woman who ran the store where the Communist Party meeting was to be held (Tr. 259-260). The three, following her instructions, went to the Frye Hotel (Tr. 260). At the hotel Hendrickson, again in the presence of appellant, asked Ralph Hall, "What floor will the Com-

munist Party meeting be on?" (Tr. 260, 263). Appellant, Mores, and Hendrickson, pursuant to Hall's directions, proceeded to the second floor, where, before they were permitted to enter the room where the meeting was to be held, they were checked against a list to ensure that only Party members whose names appeared on the list attended the meeting (Tr. 263, 486-487).[11]

This meeting at the Frye Hotel was a particularly urgent one since Henry Huff, the District leader, had just returned from a meeting of the Party's National Committee in New York City and had an important report to deliver in regard to the Party's position *vis-à-vis* the labor movement (Tr. 487-488, 263). It was because of the presence of this topic on the agenda that Party members in the labor movement who were not members of the District Committee were permitted to attend (Tr. 488). A second purpose of the meeting was to protest against the trial of the Party's national leaders for violation of the Smith Act, which was about to start in New York, for the purpose of attempting to force the Government to abandon the prosecution (Tr. 488; see *Dennis* v. *United States*, 341 U.S. 494). The meeting was ad-

[11] An additional security measure was the rental of the room in the name of a garden club (Tr. 487).

dressed by Clayton Van Lydegraf, the Party's District Organizational Secretary and a member of the District Committee and Executive Board, as well as by Huff (Tr. 265-266, 464).

In late 1949 or early 1950, Mrs. Hartle had two personal conferences with appellant in connection with her work as an officer of the Northwest District Negro Commission of the Communist Party (Tr. 465-466, 488). The conversations took place a few weeks apart with only Mrs. Hartle and appellant present (Tr. 489). At the first meeting Mrs. Hartle outlined to appellant the program which had been adopted by the Negro Commission and the District Board in regard to Negro work (Tr. 489). Mrs. Hartle stressed that the Negro work had to be pushed in the three industries in which the Party was concentrating its efforts in the Northwest (Tr. 489-490). She told appellant that it was "his main responsibility" to advance the Party's program of opening up job opportunities for Negro workers in the lumber industry (Tr. 490). Appellant, according to Mrs. Hartle, accepted these statements as a Party member, responsive to orders and subject to Party discipline, without any need on her part to persuade him to follow her instructions (Tr. 491). Appellant said "that he approved the program, and that he would do all that he could to carry it out" (Tr. 491). The purpose of the

second meeting was to check up on the progress that had been made (Tr. 491-492).

On June 30, 1950, two police officers investigating an accident involving an automobile driven by appellant found more than a hundred pamphlets in his automobile (Tr. 172, 177-178, 188). The word "Communism" appeared on the front of these pamphlets in three-quarter-inch block letters (Tr. 179, 188). In addition, the police officers found some books written by Karl Marx and a book entitled *Under the Red Star* (Tr. 180).

Later in 1950, a Party leader came to Harley Mores' house to ask Mores to go with him and show him where appellant was living (Tr. 443). Finding appellant in his bunk house, the Party leader asked appellant for his Party dues (Tr. 443). Appellant answered that he had not yet been paid and that he would leave the money at Mores' house at a later time — which he did (Tr. 443).

In August or early September 1950, appellant attended a Party meeting in Mores' house (Tr. 594), and in September 1950, appellant went to Mores' house to pay Mores his Party dues in the amount of $12. On the same occasion, appellant gave Mores $2, which Stan Hendrickson had left with appellant as a contribution to the *People's World*, a Party newspaper

(Tr. 267, 444-445, 592-593, 596). Appellant told Mores that he had been given a non-Communist affidavit and that he wished to see either Stan Hendrickson or Mel Radington concerning it (Tr. 267, 593). Mores told appellant that "the Communist Party had threshed out the affidavit," but appellant said he still wanted to see Hendrickson or Radington, as he was new in the area (Tr. 267). Mores told appellant that if appellant was going to Everett he could stop and see the Communist leadership in that area (Tr. 267-268, 593). In particular, Mores told appellant that he should see Verle Hemecke, who had been a member of the Party's Regional Executive Board until the Board had ceased holding meetings (Tr. 268). Since that time, when each Board member was given the responsibility of keeping in contact with a particular area, Hemecke had been in charge of the Everett area, which included the club of which Mores was then chairman (Tr. 268, 271-272). Appellant told Mores that he would see Hemecke about the affidavit (Tr. 269).

(b) Evidence relating to the period between the filing of the first affidavit (June 29, 1951) and the filing of the second affidavit (July 11, 1952). — In June 1952, appellant went to Mores' home to discuss an impending local union election (Tr. 270, 597). Appellant gave Mores some handbills to distribute and

told him to get as many Communist Party members as possible to go to the union meeting and vote (Tr. 270-271, 597). He also told Mores that, although Frank Patterson was still doing some Party work, neither Mores nor any other Party member should go anywhere with him since "Patterson didn't represent the Communist Party" and "might be paid by the F.B.I." (Tr. 271, 597). Appellant further told Mores that Verle Hemecke, the Party's section organizer for Everett, should have warned Mores about Patterson (Tr. 598).

(c) Evidence relating to the period after the filing of the second affidavit (July 11, 1952). — On December 12, 1952, appellant participated in a Party meeting at Verle Hemecke's home which was also attended by Hemecke, Mores, Mazie Mores, and Stan Hendrickson (Tr. 271-272, 598). That date was the date which had been set for Mores to turn in to Hemecke the Communist Party dues he had collected and to receive his Party orders (Tr. 272). Hemecke told appellant and Mores that because he, Hemecke, was overburdened with Party work appellant was thereafter to run the Sultan and Goldbar areas (Tr. 272-273, 599). Mores was thus to receive his Party orders from appellant (Tr. 272-273, 599). Hemecke also told appellant that he (appellant) and Stan Hen-

drickson were to assist Mores in reorganizing Communist Party clubs in the area (Tr. 273, 599).

On December 26, 1952, appellant was present at a regular meeting of the Goldbar Club, held at Mores' house. This meeting was also attended by Mores, Mazie Mores, Hendrickson, and Mr. and Mrs. Rantley (Tr. 273-274, 599-600). Appellant was the chairman of the meeting (Tr. 600). Pursuant to Hemecke's orders to appellant to direct Mores' Party activities, appellant gave Mores two documents (Exs. 7, 8; Tr. 273-284, 601-602). One of these documents, which was addressed "to all Clubs and Regions," set the Party goals for the registration drive being held in December 1952 and January 1953. In preparation for a special registration meeting, the document recommended the reading of a number of speeches and writings by, among others, Stalin, Malenkov, and William Z. Foster, as reported or appearing in the Party's theoretical organ, *Political Affairs*, and elsewhere (Ex. 7; Tr. 279-280). The document further proposed a series of goals to be attained, including the completion of registration and the payment of all Party dues through December, the completion of the club's "defense" fund, the fulfillment of the club's quota of "peace" signatures, the securing of at least three new subscriptions to the Party newspaper, *People's World*, the recruitment of at least one new Party member, and the

sending of a communication to "Truman and Eisenhower demanding an immediate cease fire in Korea" (Ex. 7; Tr. 280-281).

The second document which appellant gave Mores at this December 26 meeting was entitled "The Party and the 1952 Registration". Distributed by the District Committee (Ex. 8; Tr. 281, 284), it stated that, although "a few of our comrades" had been sent to prison for violation of the Smith Act, nevertheless, "We welcome and grow in the class struggle" (Ex. 8; Tr. 281-282). It urged all clubs to increase their membership and all Party members to "rally to the defense of our party and around our beloved leaders" (Ex. 8; Tr. 283).

In addition to the two documents which appellant gave to Mores for his own use, appellant gave him two additional copies of each document to deliver to other Party members (Tr. 284). One copy of each document was to be delivered to Norris and Ena Blansett, Party leaders in the area, and the other copy to Kenny Longman, a leader of the Party's Monroe Club (Tr. 284-285, 601).

At this same meeting of December 26, 1952, appellant announced that the Party was in debt in the amount of $4,500 and that "the smallest that each club had * * * offered to raise was $200.00" (Tr. 602).

Also at this meeting, Mores paid appellant his own dues and, in addition, "turned some dues in for" other Party members (Tr. 603).

In January 1953, while appellant was still in charge of the Sultan-Goldbar area (Tr. 286-287), he participated in a meeting of the Sultan and Goldbar Clubs, which had previously been merged (Tr. 285). This meeting was attended, in addition, by Mores and by Norris and Ena Blansett (Tr. 285). Appellant questioned Norris Blansett as to whether he had been doing any Party work, and he requested Mores to collect the dues of the members of the Sultan-Goldbar and Monroe Clubs (Tr. 286). Appellant also requested Mores to arrange, within five days, a meeting of certain Party members, whom he proceeded to designate (Tr. 286).

The meeting which appellant requested Mores to arrange was held on January 22, 1953, at Norris Blansett's house. It was attended by appellant, Norris and Ena Blansett, Mores, Mazie Mores, Mr. and Mrs. Rockney,[12] and several others, all of whom were Communist Party members (Tr. 287, 603-604). Appellant told those present that "Stan Hendrickson was supposed to come with him, but the F.B.I. were trail-

---

[12] In the transcript, "Rockney" is incorrectly spelled "Rantley" or "Routney."

ing him, and he didn't want to come up there and expose them all" (Tr. 604). Appellant read aloud Stalin's speech at the 19th Congress of the Communist Party of the Soviet Union, as printed in the October 1952 issue of *Political Affairs* (Tr. 297, 604). This was one of the recommended readings listed in the document which appellant gave Mores at the meeting of December 26, 1952, *supra* (Ex. 7; Tr. 280). Mores collected dues from all those present and gave the money to appellant (Tr. 288, 290). Mores told appellant that one of the members present, Mrs. Rockney, had said that she "had not meant her membership in the Community Party — in other words, she didn't want [her] church to know she was attending Communist Party meetings" (Tr. 288-289). Mores further told appellant, however, that he had collected dues from Mr. Rockney in two different months for himself and Mrs. Rockney (Tr. 290). Appellant, replying to a query from Mores as to Mrs. Rockney's Party status, stated that "The membership accepts her as a Communist Party member, and I do" (Tr. 290). Appellant also told Mores at this meeting that "We will split the club into two groups" (Tr. 290). Mores proposed that the club be divided into a Goldbar Club and a Winters Lake Club, with four members in each, which proposal appellant accepted (Tr. 290-291).

Appellant's Defense

The evidence for the defense consisted solely of the testimony of four character witnesses (Tr. 654-693) and a number of exhibits, consisting of copies of receipts for funds received from the F.B.I. by Government witnesses Harley Mores and Mazie Mores during the period in which they were acting as confidential informants (Tr. 378-385).

ARGUMENT

I

The Two-Witness Perjury Rule Does Not Apply To Prosecutions Under 18 U.S.C. 1001

Appellant urges that the district court erred in refusing to instruct the jury, in terms of the two-witness perjury rule, that the falsity of the statements made by him was required to be established by the direct testimony of two witnesses or by the testimony of one witness supported by corroborating evidence (Br. 9-20). Concomitantly, he argues, that the Government's evidence, because it was circumstantial in nature, was insufficient to support the verdict (Br. 21-25).

As appellant admits (Br. 11), however, the issue of whether the two-witness perjury rule is applicable to a prosecution under the false statement statute

(18 U.S.C. 1001) for the willful filing of a false non-Communist affidavit has already been decided by this Court, adversely to appellant's present contention, on the former appeal in this case. *Fisher* v. *United States*, 231 F. 2d 99, 105-106.[13] Appellant, we submit, has advanced no ground which would warrant the Court in departing from its former ruling. Cf. *Marron* v. *United States*, 18 F. 2d 218 (C.A. 9), affirmed, 275 U.S. 192.

---

[13] Other circuits have reached the same conclusion. *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7), rehearing granted and cause remanded on other grounds, 246 F. 2d 82; *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985.

The *Gold* decision was by an equally divided *en banc* court, four judges voting to affirm and four to reverse. There is nothing in the report of the case, however to indicate that any of the judges who voted for reversal other than Judge Bazelon (who alone wrote an opinion) shared Judge Bazelon's view that the two-witness perjury rule applies to a prosecution under 18 U.S.C. 1001 for filing a false affidavit. The other judges who voted to reverse may, so far as is known, have based their votes on other grounds.

In *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953, a conviction under 18 U.S.C. 1001 for filing a false non-Communist affidavit, based on circumstantial evidence, was affirmed. The court dismissed as "absurd" a contention that direct proof of Party membership on the affidavit-date was necessary (219 F. 2d at 248). The issue of the applicability *vel non* of the

Apart from and in addition to the considerations discussed by this Court in its former opinion (231 F. 2d at 105-106), the instant case, we submit, comes within the recognized "non-objective fact" exception to the two-witness perjury rule. Under that exception, as appellant concedes, "when the statement alleged to be false deals with a non-objective fact such as a mental state, which cannot by its very nature be contradicted by direct evidence, circumstantial evidence will suffice" (Br. 21, and cases cited). Whether appellant was a member of the Communist Party at the time he executed each of the two non-Communist affidavits here in issue — *i.e.*, on or about June 29, 1951, and July 11, 1952 — was an inference of fact to be drawn from the circumstantial proof that he was a member at other times shortly preceding, shortly following, and in between those dates. It was an inference based on the very notion of membership in an organization

---

two-witness perjury rule appears, however, not to have been raised.

In *Bryson* v. *United States*, 238 F. 2d 657 (C.A. 9), this Court affirmed a conviction under 18 U.S.C. 1001, based on circumstantial evidence, for false denial of affiliation with the Communist Party. The issue of the applicability of the perjury rule was not raised in this Court, but was urged in Bryson's petition for a writ of certiorari (No. 1065, Oct. Term, 1956 (No. 171, Oct. Term, 1957, pp. 33-35). Certiorari was denied. 78 S.Ct. 20.

and the presumptive continuance of such membership (absent evidence to the contrary) during intervals between points of time in respect of which such status has been directly shown.

It is inconceivable that Congress could have intended to require qualitatively stronger proof of membership on the affidavit-date in a prosecution under 18 U.S.C. 1001 for filing a false affidavit. The strongest conceivable proof that an accused executed a false affidavit of non-membership on a day certain would be testimony by a Party official that he had received the accused into the Party as a member on the preceding day (or even earlier on the same day), had issued him a membership card, and entered his name on the membership rolls. But even in such a case the proof that the accused, contrary to his oath, was a Party member at the moment of execution of his affidavit would, strictly speaking, be circumstantial — *i.e.*, would be based on the inference of continuity of a recently-established status, where there is no evidence tending to indicate its prior termination. And since the evidence, even in such ideal circumstances (from a prosecution standpoint), would still be circumstantial, it follows that Congress cannot reasonably be supposed to have intended to require proof other than circumstantial in a prosecution for filing a false affi-

davit of non-membership.[14] In short, since *direct* proof of membership as of the moment of execution of the affidavit of non-membership would never be available, circumstantial evidence must suffice, else conviction for filing a false affidavit would always be a practical impossibility. The latter alternative is obviously not one which can be attributed to Congress.

II

Appellant Could Not Have Been Prejudiced By the Alleged Duplicity and Multiplicity of the Indictment, Since He Was Given Concurrent Sentences On the Several Counts

Appellant contends (Br. 25-30) that the indictment was duplicitous and multiplicitous in that it alleged that he was, contrary to his oath, both a member of (counts I and III) and affiliated with (counts II and IV) the Communist Party at the time of filing of each of the two affidavits involved. He argues that the trial court should have required the Government to elect as between counts I and II, on the one hand, and counts III and IV, on the other, or, in the alter-

---

[14] The two-witness perjury rule is not, of course, a rule of due process, but one which, even in an ordinary perjury case, may be altered, qualified, or abrogated entirely by Congress. *Weiler* v. *United States*, 323 U.S. 606, 609-610.

native, should have so instructed the jury as to permit it to find him guilty on only one of the first two counts, and, similarly, on only one of the other two. He relies (Br. 26-29) on the statement of this Court in its former opinion in this case, made in connection with its discussion of this identical contention, that "Doubt should be resolved against turning a single transaction into a multiple offense" *(Fisher* v. *United States, supra,* 231 F. 2d at 103). He ignores, however, the following observations of the Court, which follow immediately after that statement, and which completely refute his present contention *(ibid.)*:

> However, appellant was only sentenced to five years on each count to run concurrently. The attack on splitting the cause of action would leave at least one good count for each of the three years. This alone does not justify reversal. See Kiyoshi Hirabayashi v. United States, 1943, 320 U.S. 81, 85, 105 * * *; Pinkerton v. United States, 1946, 328 U.S. 640, 641-642 note 1 * * *.

Since the 5-year prison terms imposed on the several counts were made to run concurrently by the sentence imposed on the retrial as well as by the original sentence, it is evident that the prior decision of this Court completely disposes of appellant's instant contention. Cf. *Marron* v. *United States, supra,* 18 F. 2d 218 (C.A. 9), affirmed, 275 U.S. 192.

III

The Innocent Error of Government Counsel In Cross-Examining of Appellant's Character Witness Hitchcock Does Not Warrant the Granting of a New Trial

Appellant's final contention (Br. 30-46) is that he is entitled to a new trial on the basis of a mistaken assumption which was held by government counsel in his cross-examination of appellant's character witness Hitchcock, and which underlay one of the questions which counsel asked of this witness. It is submitted, however, that while the incident in question was unfortunate, it is far from sufficient, taking all the circumstances into consideration, to warrant the granting of a new trial. The relevant facts, which require detailed statement, are as follows:

During the cross-examination of Mr. Hitchcock, the following occurred (Br. 31-32; Tr. 681-682):

Q. When did Fisher first ask you to appear and testify as a character witness for him?

A. In this —

Q. (Interposing) In the last trial?

A. In the last trial? About fifteen days or so before the trial.

Q. Were you alone when he approached you, or were you with any other partner of yours in the lumber business?

A. I was with my partner, Mr. Morgenthaler.

Q. Were you there when he asked Mr. Morgenthaler to testify as a character witness for him?

A. Yes, sir.

Q. Do you recall what happened when he asked Mr. Morgenthaler to testify for him?

A. Mr. Morgenthaler has a very bad heart condition and he thought it might upset him.

Q. Do you recall that when he asked Mr. Morgenthaler to testify for him, that Mr. Morgenthaler said that, "If you will look me in the eye and tell me you were not a member of the Communist Party, I will come down there"?

A. No, sir.

Q. You were not present when that occurred?

A. No, sir.

After government counsel had finished his cross-examination of Mr. Hitchcock, appellant's attorney asked that these questions "be stricken, and that the jury be instructed to disregard it, unless counsel is prepared to call Mr. Morgenthaler down here for purposes of impeachment" (Br. 32; Tr. 682). Government counsel assured the court that he had acted in good faith and that he would be willing to call Mr. Morgenthaler (Br. 32; Tr. 682). The court thereupon instructed the jury as follows (Br. 33; Tr. 683):

> Members of the jury, with regard to the last witness, particularly the testimony with respect to the statement made by Mr. Morgenthaler, that

> testimony may be stricken if Mr. Morgenthaler is not produced. Bear that in mind. That testimony should be — may be stricken, and if it is, you should give no consideration to it whatsoever.

After the jury had left the courtroom, appellant's attorney argued that government counsel's cross-examination was improper because no foundation had been laid and, even if a foundation had been laid, the matter was "immaterial, irrelevant and incompetent" (Br. 34; Tr. 693).

Counsel for defendant then, after time for reflection, merely renewed his motion to strike without requesting a mistrial. He urged additional grounds to support the motion to strike but made no contention that a fair trial was impossible before the jury which had heard the question propounded by government counsel. Nor did he object to the form of the court's admonition to the jury when it was instructed to disregard the question. The claim that the mere asking of the question was so prejudicial as to prevent a fair trial was made for the first time after the jury had returned a verdict of guilty. A defendant may not sit silently by and gamble on a favorable verdict. A motion for a new trial is not alternative relief for a criminal defendant who contends that he was entitled to a mistrial but elected to make no motion for that relief before the jury decided the issues of fact.

Gerard v. *United States*, 61 F. 2d 872, 875 (C.A. 7); *Jenkins* v. *United States*, 149 F. 2d 118, 119 (C.A. 5), certiorari denied 326 U.S. 721. In any event the decision of defendant's able trial counsel not to move for a mistrial is strong indication indeed that none was warranted. Both that attorney and the experienced trial judge heard what took place and apparently both believed that the granting of defendant's motion to strike and the giving of appropriate instructions to the jury was the proper procedure to be followed under the circumstances.

Government counsel assured the court that he would "make every effort to get Mr. Morgenthaler here" (Br. 34, 35; Tr. 693, 694). After further colloquy, the trial judge told government counsel (Br. 36; Tr. 696):

> * * * I am inclined to think that there is some question about the admissibility or the propriety of the question on cross examination. I can see your theory. I am somewhat inclined to strike it.

Government counsel thereupon explained to the court, as follows, the grounds of his question (Br. 36; Tr. 696):

> I might say in fairness to the Court I have never talked to Mr. Morgenthaler and I cannot assure the Court, when he gets here, what he will say as to the question asked of Mr. Hitchcock. I can only say from information that we have that that situation occurred.

The court, however, decided to strike the question and answer (Br. 37-38; Tr. 702), with the result that Mr. Morgenthaler was not called as a witness.

Appellant's attorney asked only that the discussion be stricken and he explicitly agreed to the form in which this was done (Br. 36-37; Tr. 696-697):

> THE COURT: Of course, if the Court strikes the testimony on the theory last advanced, that it was improper cross examination, I think I would state that ground and no more.
>
> MR. ETTER [appellant's attorney]: And the others will be disregarded. I think Your Honor should do it that way and say that the previous colloquy is disregarded.
>
> THE COURT: Previous colloquy?
>
> MR. ETTER: Should be disregarded.
>
> THE COURT: Colloquy?
>
> MR. ETTER: Yes, that is a fair way to state it.
>
> THE COURT: Is that satisfactory?
>
> MR. HELSELL [government counsel]: I think that is satisfactory, Your Honor. * * *

Accordingly, the court, in the following language, instructed the jury to disregard the question and answer (Br. 37-38; Tr. 702):

> You will recall when Mr. Hitchcock was on the stand, the last witness, the question was asked on cross examination with respect to a statement allegedly made by Mr. Morgenthaler in the presence of Mr. Hitchcock. The Court has concluded

that that question was not a proper question on cross examination and, therefore, it should not have been asked and the question as well as the answer will be stricken and you will disregard it entirely.

In view of the Court's ruling there would be no occasion to — it would not be permissible to — call Mr. Morgenthaler even though he might be available. So, whether he is or not is not material in view of the Court's ruling. Therefore, you will disregard the answer and likewise the question with respect to that statement entirely and put it out of your mind and likewise you will disregard entirely the colloquy and the comments between Counsel as respecting that testimony as it occurred in the court room and erase it from your mind.

Counsel for appellant made no further objections to the stricken material, nor did he at any time move for a mistrial on the basis of the incident in question. Subsequently, during his instructions to the jury, the trial judge again cautioned them as follows (Tr. 775):

You must disregard any statement made by any person on either side of this case as to what any testimony has been unless borne out by your final recollection thereof.

You are likewise to disregard any evidence which may have been ordered stricken by the Court, and must also disregard any question or answer thereto, to which the Court has sustained an objection.

On April 5, 1957, following the return of the verdict, appellant filed an affidavit executed by Mr.

Morgenthaler, in which the affiant stated that he had at no time ever said to appellant, in words or in substance, that he would testify as a character witness for him if he would "look me in the eye and state you are not a Communist," (Br. 38-39). Mr. Morgenthaler further stated in his affidavit that, when appellant asked him to testify as a character witness, he told appellant that he would be "perfectly willing to testify" on his behalf, but that he could not do so because of his heart condition (Br. 39).

On April 11, 1957, Mr. Helsell, the government attorney who conducted the cross-examination in question, filed an affidavit stating that, prior to the second trial in this case, he had been advised by a special agent of the Federal Bureau of Investigation that the Bureau had information that, when appellant approached one of his employers prior to the first trial and asked him to appear as a character witness, the employer had declined to do so "under the circumstances and for the reasons described in affiant's question directed to the witness Hitchcock" (Br. 40). The attorney further stated in his affidavit that he had been further advised by the agent that this information had not been directly reported to the F.B.I. by the employer in question, but had come from other sources (Br. 40). Counsel explained, as follows, the

grounds on which he had based the question to Mr. Hitchcock which is here involved (Br. 40-41):

> Accordingly, when it appeared from the cross-examination of the witness Hitchcock that his partner in the logging business, Mr. Morgenthaler, was present when Hitchcock was asked to appear as a character witness and when it further appeared that Mr. Morgenthaler was not going to appear himself as a character witness at the second trial and had not appeared during the first trial, affiant concluded that Mr. Morgenthaler was the partner in the H. M. and H. Logging partnership who had declined to testify in the circumstances and for the reasons set forth in affiant's question to Mr. Hitchcock. * * *
>
> * * * * *
>
> Affiant has been advised that Mr. Ray S. Hammer, Jr., now the sole remaining partner of Mr. Hitchcock in the H. M. and H. Logging business, has stated that he was approached by the defendant and asked to testify at the prior trial of this action as a character witness. Mr. Hammer declined to do so. He further states that in subsequently describing the incident to other people he may have stated that: "If Fisher had looked me in the eye and said he wasn't a Communist, I would have testified for him."
>
> It was apparently the discussion by Mr. Hammer of the incident in the community which resulted in the information available to affiant at the time of trial. * * *

After thus setting forth the circumstances of his mistake, the attorney's affidavit concluded as follows (Br. 41-43, italics in the original):

> * * * Although it now appears that affiant was

mistaken when concluding that Mr. Morgenthaler was the partner who had been approached in the fashion above described and who had declined to testify for the reasons set forth above, the mistake was the result of a spontaneous conclusion arrived at during the heat of a court trial. The question asked of Mr. Hitchcock was one which affiant then sincerely believed would affect Mr. Hitchcock's true opinion of the defendant's character for truth and veracity. Although hindsight indicates that Mr. Hitchcock should have been asked whether he had *heard* that one of his partners had declined to testify for the reasons stated, Hitchcock had testified that he was present when his partner was approached to testify and it was apparent that that other partner was not going to appear as a character witness. For that reason affiant chose to interrogate Mr. Hitchcock directly about the transaction and assumed that Mr. Hitchcock had been present when it occurred. That assumption now appears to be erroneous. Affiant now concedes the correctness of the Court's ruling that the question should not have been asked, and agrees that the jury was properly instructed to disregard it. However, affiant reiterates that the question propounded to Mr. Hitchcock was the result of an honest mistake, and was not asked as the result of any malicious or underhanded intent on affiant's part to prejudice the defendant or to prevent him from having a fair trial.

From the foregoing necessarily extended recital, it is possible to sum up the pertinent facts as follows: Government counsel was in possession of information, according to which, as he understood it, an employer of appellant — a partner of witness Hitchcock — had, when asked by appellant to be a character witness

on his behalf, told appellant that he would do so if he would "look [him] in the eye" and tell him that he was "not a member of the Communist Party." Counsel, understandably, but mistakenly, assumed (from the facts (1) that Hitchcock testified on cross-examination that he was present when appellant made such a request to Hitchcock's partner, Mr. Morgenthaler, and (2) that Morgenthaler had not appeared, and was not going to appear, as a witness) that the partner who had made this statement was Morganthaler. Accordingly, for the purpose of seeking to impeach witness Hitchcock as a character witness, counsel asked Hitchcock if he was present when Morganthaler made the statement in question. The true fact (which counsel did not learn till after the trial) was that a *third* partner, Mr. Hammer (according to information in the possession of the F.B.I.), having been asked by appellant to testify on his behalf as a character witness and having declined to do so, "may have" told other persons, in subsequently describing the incident, that he would have consented to testify on appellant's behalf if appellant had "looked me in the eye and said he wasn't a Communist." The court, very shortly after the asking and answering of the pertinent question during Hitchcock's cross-examination, struck the question and answer and instructed

the jury to disregard the matter entirely. This action of the court was taken, not because of the error of government counsel as to who made the statement in question and the attendant circumstances (which error was not discovered till later), but because, in the court's view, the question had not been properly framed (apparently — though the record is not entirely clear on the point — because it was cast in the form of an assumption of fact that the incident in question had occurred, as distinguished from a query as to whether Hitchcock had ever "heard" that such an incident occurred).

These being the relevant facts, it is submitted that there is no basis for the contention that appellant was the victim of reversible error.

1. First, the jury was instructed, as effectively as in the nature of things was possible, that the "question was not a proper question," that it "should not have been asked," and that, accordingly, both the question and the answer were "stricken" and the jury was to "disregard it entirely" and "Put it out of your mind" (Br. 37, 38).

As was observed by the Supreme Court in *Opper* v. *United States*, 348 U.S. 84, 95, "Our theory of trial relies upon the ability of a jury to follow instruc-

tions." See also, to the same effect, *Marron* v. *United States*, 18 F. 2d 218, 219 (C.A. 9), affirmed, 275 U.S. 192; *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C.A. 9), affirmed, 336 U.S. 613. Prejudice is particularly unlikely where the court's instructions are given (as they were here) promptly and clearly (*Remus* v. *United States*, 291 Fed. 501, 510 (C.A. 6), certiorari denied, 263 U.S. 717); where (as is certainly true in this case) there is ample admissible evidence to support the verdict (*Marron* v. *United States*, *supra; Metzler* v. *United States*, 64 F. 2d 203 (C.A. 9)); and where (as here) the witness answered the stricken question in the negative. *Jung Quey* v. *United States*, 222 Fed. 766 (C.A. 9); *Clark* v. *United States*, 23 F. 2d 756 (C.A. D.C.). Similarly, where government counsel, in arguing to the jury, makes an improper statement which is not substantiated by the evidence, the ordinary rule is that the error is cured by withdrawing the statement, particularly where, as here, there is strong evidence to support the Government's case. *Sawyer* v. *United States*, 202 U.S. 150, 167-168; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-240, 242-243. The courts are particularly reluctant to order a new trial for a single misstatement made in the course of a long trial (*Nye & Nissen* v. *United States*, *supra*, 168 F. 2d 846

(C.A. 9), affirmed, 336 U.S. 613), especially if made in the excitement of the trial (see *Sawyer* v. *United States, supra,* 202 U.S. at 168) and in good faith (*Lewis* v. *United States,* 74 F. 2d 173, 179 (C.A. 9); *Clark* v. *United States, supra,* 23 F. 2d 756 (C.A. D.C.)). Since it is clear from the record, as summarized above, that the government attorney's error in framing his question was made in good faith, as the result of an easily understandable confusion of identities and attendant circumstances, and since the evidence of appellant's guilt can be said, without exaggeration, to have been truly overwhelming (see *supra,* pp. 3-22), there is, we submit, clearly no basis for the contention that reversible error resulted from the incident in question.

2. Furthermore, on the basis of the information which government counsel possessed, it would, we think, have been proper to ask witness Hitchcock, for the purpose of attempting to impeach him as a character witness, whether he had ever *heard it said in the community* that one of his partners, a co-employer of appellant, after having refused appellant's request that he testify on his behalf as a character witness, had told others that he would have agreed to testify for appellant if the latter had "looked me in the eye and said he wasn't a Com-

munist"[15]. For, a character witness does not testify as to the defendant's character on the basis of his own knowledge, but rather on the basis of statements he has heard made by others in the community. *Michelson* v. *United States*, 335 U.S. 469, 479; *Sloan* v. *United States*, 31 F. 2d 902, 906 (C.A. 8). Therefore, in cross-examining a character witness, counsel can properly question the witness as to whether he has heard of certain facts, such as arrests and convictions for other offenses, damaging to the reputation of the defendant in order to impeach either the veracity or reliability of the testimony of the witness that the defendant has a reputation for truth and veracity. *Michelson* v. *United States*, *supra*, 335 U.S. at 479; *Mitrovich* v. *United States*, 15 F. 2d 163 (C.A. 9).

---

[15] Although most state courts hold that the impeaching admission on the part of the character witness must relate to something which he has heard (damaging to the accused's reputation) prior to the commission of the offense for which the accused is on trial (see 47 A.L.R. 2d 1302), the only federal case in point states that a character witness may be questioned as to events either before or after the alleged commission of the crime, so long as they are not too remote. *Sloan* v. *United States*, 31 F. 2d 902, 906 (C.A. 8). Since, in the present case the affidavits were filed in 1951 and 1952, and the prosecutor's question related to an incident reported to have occurred in 1954, the question would not, we believe, have been improper as relating to an event occurring too remote in time from the offenses charged.

Assuming that Mr. Hammer in fact made such a remark to other persons as he says he "may have" made (according to the F.B.I.'s information), government counsel could have properly questioned Hitchcock as to whether he had ever heard it said in the community that one of his partners had made such a statement. For, if Hitchcock had heard that such a statement had been made, an admission on his part that he had heard of it would obviously have seriously impeached his testimony that appellant had a good reputation for truth and veracity.[16]

It would, in other words, have been proper for the government attorney to incorporate into a *properly-framed question* much of the essential contents of the question which he did in fact ask (and which was

---

[16] The impeaching question must be phrased in such a manner as not to assume the truth of the alleged facts damaging to the defendant's reputation. *Michelson* v. *United States*, *supra*, 335 U.S. at 482; *Little* v. *United States*, 93 F. 2d 401, 408 (C.A. 8), certiorari denied, 303 U.S. 644. In other words, such questions must be phrased "Have you heard?" rather than "Do you know?" *Michelson* v. *United States*, *supra*, 335 U.S. at 482; *Kasper* v. *United States*, 225 F. 2d 275, 279 (C.A. 9). Here, the question asked ("Do you recall * * *?") assumed the fact of the event asked about. Consequently, apart from the mistake of government counsel as to which partner made the statement in question and the circumstances surrounding it, the court was concededly correct in striking the question and answer.

later stricken). This fact serves further to delimit the area of any possible prejudice.

3. Finally, it is to be recalled that counsel for appellant explicitly agreed to the form in which the trial judge directed the question and answer to be stricken (*supra*, pp. 31-32) and made no further objection or motion for a mistrial. This Court has held that where a defendant objects to the cross-examination of a character witness on one ground and the objection is overruled, any objection to the question on other grounds is waived. *Kasper* v. *United States*, 225 F. 2d 275 (C.A. 9). For the same reason, where a defendant's objection is, as here, *sustained*, and he accepts the court's order striking the question and answer, possible objections to the question based on other grounds should likewise be deemed waived. The Court of Appeals for the Eighth Circuit has, in fact, so held. *Roberts* v. *United States*, 96 F. 2d 39 (C.A. 8); cf. *Cossack* v. *United States*, 82 F. 2d 214, 216 (C.A. 9), certiorari denied, 298 U.S. 654, 678.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY,
United States Attorney
Western District of Washington
PHILIP R. MONAHAN
BRUCE J. TERRIS
Attorneys, Department of Justice,
Attorneys for Appellee

JANUARY, 1958.